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SUBJECT: Canada's Supreme Court strengthens free speech
constitutional protections

¶1. (U) Summary: A Supreme Court of Canada ruling on December 22 has added greater protections for journalists against claims of defamation in striking down two separate findings of libel against two newspapers. Stating that "current [defamation] law does not give adequate weight to the constitutional value of free expression," the Supreme Court created a new "responsible communication" defense to libel claims on matters of public interest in which a journalist's attempts to report fairly and accurately are of greater importance than a discovery of false allegations. This defense will also be applicable to internet media, including bloggers. The Supreme Court compared Canada's defamation laws specifically to those of the U.S. and Commonwealth countries, and struck a balance between the need for "productive debate" and the right of individuals to protect their reputations. End Summary.

THE CASES

¶2. (U) Peter Grant v. Torstar Corp.: the "Toronto Star" had examined allegations that a private businessman used political influence to secure a prime location for a private golf course. The article quoted local residents critical of the development's environmental impact and suspicious that Grant was working behind the scenes to circumvent zoning and environmental laws and secure government approval. Grant refused to comment on the subject to the reporter. In the provincial court, the trial judge had ruled that a defense of "public interest responsible journalism" would not apply and sent the case to the jury on the defense of the truth of the statements. The jury found for the plaintiff and awarded Grant general, aggravated, and punitive damages. The Court of Appeal subsequently found in favor of the "Toronto Star" on the basis of flawed instructions to the jury and the dismissal of the responsible journalism defense.

¶3. (U) Quan v. Cusson: the "Ottawa Citizen" had printed a series of articles alleging that Danno Cussan, an Ontario police officer, misrepresented himself to New York authorities and interfered with rescue operations following the 9/11 attacks by claiming that he and his dog were a trained Royal Canadian Mounted Police (RCMP) sniffer-dog team. At trial in Ontario in 2006, the defense did not rely on the "responsible journalism" argument often used in the United Kingdom but not recognized by any Canadian court at that time. The jury found that many but not all of the allegations in the article were true and awarded Cusson general damages of C\$100,000 (\$94,500). The Court of Appeal subsequently upheld the decision but also took the opportunity to establish a responsible journalism defense under Ontario law.

THE RULINGS

¶4. (U) Citing the Canadian Charter of Rights and Freedoms in the 9 - 0 decision, Chief Justice Beverly McLachlin explicitly recognized the "vital role of communications media" in providing "freewheeling debate" on issues of public interest. Calling the current defamation law a "regime of strict liability," the Supreme Court found that the current levels of protection for free expression are not "justifiable" even with the necessary "value" of protecting reputations. The Chief Justice underscored the importance in Canadian law and culture in protecting individuals from public harm to their names, while adding that , "although the right to free expression does not confer a license to ruin reputation, ... the balance tips in favour of broadening the defences available to those who communicate facts it is in the public's interest to know." The ruling defined such a defense as one that would "allow publishers to escape liability if they can establish that they acted responsibly in attempting to verify the information on a matter of public interest," reasoning that this would be a "reasonable and proportionate response to the need to protect reputation while sustaining the public exchange of information."

¶5. (U) In *Quan v. Cusson*, the Supreme Court ordered a new trial in which a "defence of responsible communication on matters of public interest ... is applicable." This ruling, also 9 - 0, immediately followed that of *Peter Grant v. Torstar Corp.* and drew

upon it for precedent. The Chief Justice ruled that "the public interest test is clearly met as the Canadian public has a vital interest in knowing about the professional misdeeds of those who are entrusted by the state with protecting public safety." The ruling specified that the issue of liability in this instance rests upon whether the defendants were "diligent" in trying to verify the allegations prior to publication and emphasized that any factual mistakes in the articles are "largely immaterial."

¶6. (U) The Supreme Court ruling compared existing Canadian law to those of the U.S. and other common law democracies, and found that such a comparison "favours replacing the current Canadian law with a rule that gives greater scope to freedom of expression while offering adequate protection of reputation." Citing the "Sullivan" case from U.S. Supreme Court rulings, the Supreme Court noted that the U.S. standard of proving actual malice has made it "extremely difficult" to sue successfully for defamation. Although Commonwealth countries have rejected the precise balance struck in "Sullivan," the Supreme Court of Canada admitted that the law has begun to shift in favor of broader defenses for the press in the United Kingdom, Australia, New Zealand, and South Africa. The Chief Justice noted that the Supreme Court was seeking a "third option" for Canada - one that allows for far greater protection for reputation than the U.S. model, but one that also sustains the "cut and thrust" necessary to public discourse.

¶7. (U) The Supreme Court ruling also specifically extended the new responsible communication defense to the internet media, including bloggers, making no distinction among journalists working in print media, broadcast media, or internet media, or anyone "publishing material of public interest in any medium."

COMMENT: THE IMPACT

¶8. (SBU) With weak protections protecting investigative journalism of public figures, Canadian media commentators had complained that news stories can be "watered down" or even thrown away due to concerns of losing an expensive law suit. This ruling will significantly help to protect journalists and publishers from

law suits by those who are simply unhappy with an unflattering portrayal, and places the onus of proof on the plaintiff to show that the journalist acted irresponsibly and unprofessionally in researching the story. While the Supreme Court sought to place its ruling between the U.S. and Commonwealth countries' standards, the new Canadian standard brings it far more closely in line with U.S. law than that of the U.K. However, Canadian law continues to place a higher value on protection of reputation than the U.S. does for public figures.

BREESE